No. 2879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK P. McKINNEY, as Receiver of the OLYMPIA BANK & TRUST COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA,

Appellees,

and

C. S. REINHART and C. WILL SHAFFER, Stockholders of OLYMPIA BANK & TRUST COMPANY, a Corporation, for Themselves and All Other Stockholders of Said Company,

Appellants,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA,

Appellees,

and

ROY A. LANGLEY, as Receiver of the STATE BANK OF TENINO,

Appellant,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA,

Appellees.

BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

P. M. TROY,

Solicitor for Frank P. McKinney, as Receiver of the OLYMPIA BANK & TRUST COMPANY, a Corporation.

Business and Post Office Address: Olympia National Bank Building, Olympia, Washington.

FRANK C. OWINGS,

Solicitor for Roy A. Langley, as Receiver of the STATE BANK OF TENINO.

Business and Post Office Address: Suite 8, Funk-Volland Building, Olympia, Washington.

Recorder Press, Olympia, Wash.

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FRANK C. OWINGS,

Solicitor for Roy A. Langley, as Receiver of the STATE BANK OF TENINO.

Business and Post Office Address: Suite 8, Funk-Volland Building, Olympia, Washington.

STATEMENT BY MR. TROY, SOLICITOR FOR FRANK P. M'KINNEY, AS RECEIVER OF THE OLYMPIA BANK & TRUST COMPANY, A CORPORATION, AND BY MR. OWINGS, AS SOLICITOR FOR ROY A. LANGLEY, AS RECEIVER OF THE STATE BANK OF TENINO.

In order to avoid confusion it seems proper to counsel to preface their brief by stating that Frank P. McKinney, as receiver aforesaid, began an action for an accounting against the United States National Bank of Centralia and its receiver in the District Court for the Western District of Washington, Southern Division, and thereafter a similar action was instituted by Roy A. Langley, as receiver of the State Bank of Tenino against the same defendants in the same court, and that when the McKinney case came on regularly for trial solicitors for A. R. Titlow, as receiver of the United States National Bank of Centralia, requested a consolidation of both causes. The trial was arrested until the solicitor for Langley, as receiver, as aforesaid, could be communicated with, whereupon the lower court directed a consolidation of the two causes for the purposes of trial. (Transc. of Record, pp. 46, 47, 48 and 49.) Thereafter the lower court entered its order that the causes on appeal should be consolidated and "that but one transcript and record and one set of briefs may be required and used on the said appeal." (Transc. of Record, p. 195.)

We will, therefore, conforming to the rules of this court, make separate statements of the case, separate specifications of errors and separate arguments in this brief, the McKinney appeal being prepared by Mr. Troy and the Langley appeal by Mr. Owings.

P. M. TROY,

Solicitor for Frank P. McKinney, as Receiver of the Olympia Bank & Trust Company, a Corporation.

FRANK C. OWINGS,

Solicitor for Roy A. Langley, as Receiver of the State Bank of Tenino.

STATEMENT OF THE CASE OF FRANK P. McKINNEY, AS RECEIVER OF THE OLYMPIA BANK & TRUST COMPANY, A CORPORATION, APPELLANT, VS. UNITED STATES NATIONAL BANK OF CENTRALIA, A CORPORATION, AND A. R. TITLOW, AS RECEIVER OF THE UNITED STATES NATIONAL BANK OF CENTRALIA, APPELLEES, AND C. S. REINHART AND C. WILL SHAFFER, AS STOCKHOLDERS OF THE OLYMPIA BANK & TRUST COMPANY, A CORPORATION, FOR THEMSELVES AND ALL OTHER STOCKHOLDERS OF THE SAID COMPANY, APPELLANTS, VS. UNITED STATES NATIONAL BANK OF CENTRALIA, A CORPORATION, AND A. R. TITLOW, AS RECEIVER OF THE

UNITED STATES NATIONAL BANK OF CENTRALIA, APPELLEES.

BY MR. TROY.

This is an action brought by the Receiver of the Olympia Bank & Trust Company against the United States National Bank of Centralia, in which C. S. Reinhart and C. Will Shaffer, stockholders of the Olympia Bank & Trust Company, have intervened.

The action of the complainant revolves around, and involves three claims:

A.

A claim of $36,550, which represents a credit taken by the United States National Bank against the Olympia Bank & Trust Company on the strength of two drafts, one for $12,500, and dated September 15, 1914, and one for $24,050, presumably dated the same day, drawn by W. Dean Hays, as cashier for the Olympia Bank & Trust Company to the order of the United States National Bank, and which two drafts the complainant and appellant insists were drawn by W. Dean Hays to pay his personal notes, and that by so doing he took the funds of the Olympia Bank & Trust Company to pay his personal indebtedness to the United States National Bank, all of which was well known to the officials of the said last named bank. The facts surrounding the issuance of these two drafts and the transactions leading up to the same are of considerable length and detail and will be discussed at length hereafter.

B

That prior to the insolvency of the Olympia Bank & Trust Company and the United States National Bank of Centralia, the said Olympia Bank & Trust Company for and at the request of the United States National Bank, and for the purpose of paying money owed by the United States National Bank to the State Bank of Tenino, remitted to the said State Bank of Tenino the sum of Ten Thousand Dollars, in three items, one of $6,000, and two of $2,000 each, which will be explained hereinafter.

C

During the solvency of the Olympia Bank & Trust Company and the United States National Bank, and during the period of August and September, 1914, the United States National Bank had on deposit funds of the Olympia Bank & Trust Company and used such funds to pay notes known and described throughout the pleadings herein as the "Blumauer Notes," to-wit: Note of T. H. McClafferty for $2,500, and two notes of the Blumauer Logging Company of $3,500 each, and that it charged the Olympia Bank & Trust Company with $9,500 therefor, and took credit therefrom in its own name.

It may be well to state here that the Olympia Bank & Trust Company closed its doors on the 22d day of September, 1914, and that the United States National Bank of Centralia closed its doors on September 21, 1914, and that the State Bank of Tenino

closed its doors on the 19th day of September, 1914. (Transc. of Record, p. 64.)

The case was tried and subsequently the court rendered its decree whereby the claim for $36,550 (A) was denied, and the claim for $10,000 (B) was likewise denied, while the claim for the notes $9,500 (C) was allowed, and established in favor of the appellant. (Pp. 33-35 Transc. of the Record.)

In the order outlined above, as well as the order outlined in the appellant's Bill of Complaint, (pp. 5 to 11 inc. Transc. of the Record) the $36,550 item engages our consideration first:

A. The Olympia Bank & Trust Company was organized by the filing of its Articles of Incorporation on the 19th day of August, 1914, (p. 154 Transc. of the Record). On the 19th day of August, 1914, the United States National Bank, then a going concern, issued a certificate (being the certificate required by the laws of the State of Washington) showing that the Olympia Bank & Trust Company had on deposit with the United States National Bank $50,000.00, and that the money was deposited preliminary to the organization of the bank. (Intervenor's exhibit 3, pp. 170 Transc. of the Record.) On the 20th of August, 1914, the bank examiner of the State of Washington issued the necessary certificate and authority to the Olympia Bank & Trust Company to do business, (see Certificate of State Bank Examiner, plaintiff's exhibit 2, p. 155 Transc. of the Record), and the Olympia Bank & Trust Com-

pany opened its doors and commenced business on the 21st day of August, 1914, for the transaction of business.

The procuring cause of the organization of the Olympia Bank & Trust Company was W. Dean Hays. He had, until June of the year 1914, been the manager of the State Bank of Tenino (see testimony of W. Dean Hays, p. 67 Transc. of the Record). In July of that year he sold his stock in the State Bank of Tenino to C. S. Gilchrist, who was the vice-president and manager of the United States National Bank of Centralia, and took up the matter of the organization of a bank in Olympia. (Testimony of W. Dean Hays, Transc. of the Record, pp. 67 and 68.) Gilchrist, as we say, was a director and vice-president of the United States National Bank. (Testimony of C. S. Gilchrist, p. 114 Transc. of the Record.) The said C. S. Gilchrist was the active manager of the bank. (See testimony of George Dysart, p. 114, Transc. of the Record.) Prior to the organization of the Olympia Bank & Trust Company both Hays and Gilchrist were anxious to procure the organization of a bank in Olympia. The United States National Bank was at Centralia, a city in the southwestern portion of the State of Washington. It was interested in another bank in Centralia, the Union Loan & Trust Company, and also the Willapa Harbor State Bank, at Raymond. Its funds were loaned out heavily to lumbering concerns, and it was trying to realize on its loans, and strengthen its resources. (See testimony of George Dysart, pp. 112

and 114 Transc. of the Record.) (Testimony of C. S. Gilchrist, pp. 114 to 134 inc. Transc. of the Record.) (Testimony of Frank A. Hill, p. 106 Transc. of the Record), and it was very anxious to start a bank in Olympia, in order that it might secure a feeder. In addition thereto, it was heavily interested in the State Bank of Tenino. (Testimony of C. S. Gilchrist, p. 129 Transc. of the Record.) Mr. Hays also was anxious to start a bank in Olympia. Olympia is distant from Centralia about thirty miles, and Gilchrist telephoned frequently to Mr. Hays in Olympia, and transacted the business of opening the Olympia Bank & Trust Company in the home of Hays at Olympia. (Testimony of W. Dean Hays, p. 69 Transc. of the Record.)

The circumstances leading up to the organization of the Olympia Bank & Trust Company are graphically told by Mr. Hays. (Testimony of W. Dean Hays, pp. 66 to 71 inc. Transc. of the Record.) Gilchrist frequently telephoned to Hays and Hays procured five stockholders to give notes aggregating $11,450, and other stockholders who took stock and paid cash therefor in the sum of $2,000, or a total of $13,450. These notes were issued to W. Dean Hays, and dated August 15, 1914, and were notes signed as follows, to-wit:

C. Will Shaffer, $1,100.00; C. S. Reinhart, $1,-650.00; Charles E. Hewitt, $1,100.00; W. A. Weller, $1,100.00; F. G. Blakeslee, $1,000.00, and I. M. Howell, $5,500. These notes were secured from these

several stockholders on the assumption that Hays was loaning them the money personally to buy the stock. (See testimony of W. T. Cavanaugh, C. S. Reinhart, I. M. Howell, Charles E. Hewitt, C. Will Shaffer, pp. 91, 99, 100, 101 and 104, Transc. of the Record.) Thereupon Gilchrist, after telephoning Hays and making arrangements with him came to Olympia on the evening of the 19th day of August, 1914, with the cashier of the United States National Bank, J. W. Daubney, whereupon Hays, at his said home in Olympia, endorsed the notes of Shaffer, et al., for $11,450, and paid the $2,000 in cash, and gave his own notes for $36,550 (one for $12,500, and one for $24,050) to the United States National Bank, for which the United States National Bank, through its cashier, Mr. Daubney, issued a certificate of deposit for $50,000. (See intervenor's exhibit 3, p. 170 Transc. of the Record), and thereafter the Olympia Bank & Trust Company opened its doors and commenced business. It was understood in the beginning that the principal deposit of the Olympia Bank & Trust Company was to be carried in the United States National Bank at Centralia. (Testimony of W. Dean Hays, p. 70 Transc. of the Record.) (Testimony of C. S. Gilchrist, p. 128 Transc. of the Record.) When Gilchrist came to Olympia he brought $2,500 with him, so that Hays could open the bank. The stockholders other than Hays, in the Olympia Bank & Trust Company subscribed for stock in the sum of $13,450, while Hays subscribed for stock in his own name in the sum of $36,550.

Upon doing this the Olympia Bank & Trust Company opened its doors and commenced business as we have said, and continued to do business until September 22, when it failed. The United States National failed the day before. A careful reading of the testimony of Mr. Hays and Mr. Gilchrist, being the only parties involved, is convincing to the effect that the United States National Bank saw fit to take the notes of the other stockholders for $11,450, and $2,000 in cash, and Hays' notes for $36,-550, and to give as consideration $50,000 deposit or credit to the Olympia Bank & Trust Company. Upon the strength of the organization of the Olympia Bank & Trust Company it secured deposits from various depositors and it continually remitted money to the United States National Bank, and the United States National Bank became the beneficiary to the extent of $45,498.91, which it secured in its depository from the Olympia Bank & Trust company by reason of the organization of the Olympia Bank & Trust Company. (See the following testimony of W. Dean Hays, p. 71, Transc. of Record, Plaintiff's Ex. 5, Transc. of Record.)

About the time the United States National Bank of Centralia was to close its doors, according to the testimony of Hays, and on August 15th, 1915, Gilchrist came to the residence of Hays in Olympia, arriving at about 6 o'clock in the morning, and told Hays that the Bank Examiner was at Centralia and would examine the United States National Bank and that the said examiner would object to the two notes

aggregating $36,550, and brought with him two drafts, prepared by Gilchrist, on the stationery of the United States National Bank, for Hays to sign, and Hays did so with the agreement that in case the examiner objected to the two notes, to-wit, Hays' notes, that he would use the drafts and afterwards Hays would return the notes, and continue the agreement that they had entered into before, to-wit: that the United States National Bank would carry Hays' notes. The drafts were given with the understanding that they were not to be used except in case the Bank Examiner objected to the two notes. These drafts were never returned to the Olympia Bank & Trust Compony. As we say, they were written on the stationery of the United States National Bank. One of the drafts, to-wit: the one for $12,500, was found at Centralia after the United States National Bank went into the hands of a receiver. (See p. 72 Transc. of the Record.) The other has never been seen. This draft was not marked paid (Intervenor's exhibit 4, p. 171 Transc. of the Record). Neither of the drafts were returned to the Olympia Bank & Trust Company marked paid, and as we say, one was found among the files of the United States National Bank, not marked paid, and the other has never been found. (See testimony of W. Dean Hays, p. 72 et seq. Transc. of the Record.)

This is not contradicted by Gilchrist or any of the officers of the United States National Bank, and in any event it is clear as we say, that Hays paid his own indebtedness of $36,550 to the United States Na-

tional Bank with funds of the Olympia Bank & Trust Company. It was not attempted to undo the transaction as to the $2,000 in cash, nor as to the notes of the other stockholders aggregating $11,450, but it was attempted to turn back the Hays notes, and take credit therefor out of the deposits or funds of the Olympia Bank & Trust Company with the United States National Bank in the sum of the Hays notes, to-wit: $36,550.

B. As to the $10,000 remittances by the Olympia Bank & Trust Company, at the request of the United States National Bank of Centralia for Tenino, the evidence is quite simple and plain. The Olympia Bank & Trust Company owed the State Bank of Tenino no money at any time. (Testimony of Isaac Blumauer, p. 81 Transc. of the Record), and according to all of the testimony and especially the testimony of Blumauer, it will be seen that the United States National Bank at all times was indebted to the State Bank of Tenino. The testimony of Hays and of Blumauer is that Blumauer, who was the manager of the State Bank of Tenino, called up over the telephone, Gilchrist, of the United States National Bank, asking for money. The United States National thereupon called up Hays and asked Hays to remit the money, which he did. Hays, or the Olympia Bank & Trust Company, charged the remittance to the United States National Bank, and credit was given the United States National Bank for the remittances by the said State Bank of Tenino. Gilchrist, for the United States National Bank, admits

that he was called up by Blumauer for the State Bank of Tenino and asked to remit money (which the United States National owed the State Bank of Tenino), for it, the State Bank of Tenino. He admits also calling up Hays of the Olympia Bank & Trust Company and asking Hays to remit, but he contends that the Olympia Bank & Trust Company did so on its own initiative (althought the Olympia Bank & Trust Company did not owe the State Bank of Tenino anything) and that its claim is against the State Bank of Tenino. (See generally on this subject: Testimony of W. Dean Hays, pp. 74 and 75, Transc. of the Record.) (Blumauer, pp. 80 and 82, Transc. of the Record; Gilchrist, p. 130, Transc. of the Record; Roy A. Langley, p. 65, Transc. of the Record.) In fact, there is no contradiction in the record. The appellant is entitled to a credit against the United States National Bank in the sum of $10,000, and in any event would be entitled to a credit against the State Bank of Tenino in the sum of $10,000, if not against the United States National. However, the transaction was plain. The United States National Bank owed money to the State Bank of Tenino; the State Bank of Tenino owed other creditors, and for and at the request of the United States National Bank, the Olympia Bank & Trust Company, which owed nothing to the State Bank of Tenino, or to the United States National Bank, remitted money at the request of the United States National Bank, and in any event the United States

National Bank became indebted to the Olympia Bank & Trust Company for such sum, so remitted.

C. No complaint is made of the action of the court in reference to this feature. It was the claim of the appellee that these notes were bought by the Olympia Bank & Trust Company. These notes were among the papers of the United States National Bank when it failed. (Testimony of W. Dean Hays, p. 73, Transc. of the Record.) This represents a charge made under date of September 4, 1914. No such paper was ever in the hands of the Olympia Bank & Trust Company (p. 73, Transc. of the Record). Mr. Gilchrist says that the three notes had been taken by the United States National Bank from the State Bank of Tenino. They were charged up against the Olympia Bank & Trust Company, September 4, 1914. "Our bank remained open for three weeks after that; still we had never sent the notes to the Olympia Bank & Trust Company, and never notified it." They further stated that all of the charges made back and forth between the United States National Bank and the Olympia Bank & Trust Company were confirmed by letter, but that this was one exception. The reason, he says, that the Olympia Bank & Trust Company was not notified, and that the charge was not confirmed by letter, and why they retained the notes for three weeks after the said September 4, 1914, and before his bank closed, was because he expected to get renewal notes, and send them to the Olympia Bank & Trust Company. These renewal notes were never procured

and never sent. (Testimony of C. S. Gilchrist, pp. 130 and 131, Transc. of the Record.) It is manifest that there was no error in the court's ruling and that there was nothing upon which to base the contention that a sale had been made.

In general, the statements of account between the two banks are shown very readily by the two exhibits, which we set forth in the brief following. The first is plaintiff's exhibit No. 4 and which is made up from the records and data found by the receiver, McKinney, when he became receiver of the Olympia Bank & Trust Company, and which is explained by his testimony, (pp. 51 to 63 inc., Transc. of the Record, while plaintiff's exhibit 5 is a statement of account prepared by the receiver of the United States National Bank and was introduced by the plaintiff as exhibit No. 5, with the distinct understanding and reservation that the plaintiff was not bound by it, but that it was introduced solely for the purpose of illustrating the differences between the two banks. (See testimony of Frank P. McKinney, pp. 61 and 62, Transc. of the Record.) One, it must be understood, is made up from the records of the Olympia Bank & Trust Company, to-wit, Plaintiff's Exhibit 4, the first statement. While the second, Plaintiff's Exhibit 5, is made up from the records of the United States National Bank of Centralia. The items that are checked are items over which there is no controversy, while the items which have a cross to the left are the disputed items in plaintiff's exhibit 4, the first statement. While in Plaintiff's Ex-

hibit 5, the second statement, the items of debits on the left hand side concerning which there is no controversies are checked, while the items over which there is controversy are indicated by checks and crosses, the checks and crosses being to the right while on the credit side, the checks being items over which there is no controversy, are to the left, while the items over which there is a controversy are marked by a cross. Herewith follow the statements:

U. S. NAT'L. BANK, CENTRALIA.
In account with THE OLYMPIA BANK & TRUST COMPANY

Dr.

1914.							1914.			
ug. 18	Rem. to Seattle	√	2000	√	√		Aug. 19	Coin		2500
21	" " Tacoma	√	5000	√	√		25	Rem. Seattle		1000
24	" " Seattle	√	3795	√	√		Sept. 3	Draft		1000
	"	√	160.38	√	√		5	Stock sold		1100
	"	√	255.95	√	√			" "		400
	"	√	358.10	√	√		8	" "		330
25	"	√	12500.	√	√		11	Draft		3000
26	"	√	147.25	√	√		14	"		5000
27	"	√	147.	√	√		Bal.			89169.26
			40000							
	" to Seattle	√	2000.	√	√					
	Captl. & Und. Profits									
		×	55000.	?	o					
28	Rem.	√	216.60	√						
29	"	√	52.	√	√					
31	Tel. Tfr to Tacoma	√	2000.	√	√					
	Cost of Telegram	×	.35	o	√					
	Rem.	√	56.50	√	√					
ept. 1	"	√	94.65	√	√					
	"	√	338.30	√	√					
3	" to Tacoma	√	4000.	√	√					
4	"	√	377.18	√	√					
10	" Seattle	√	5000	√	√					
12	" Seattle for Tenino									103499.26
		×	6000.	o						
15	" " " "	×	2000.	o			89169.26	103499.26		2500
18	Coin " "	×	2000.	o			7000	48000		1000
										1000
			103499.26				82169.26	55499.76		8
Filed Dec. 15, 1915).										12500.

(Plaintiff's Exhibit 4, p. 157, Transc. of Record.)

OLYMPIA BANK & TRUST CO.

In account with UNITED STATES NATIONAL BANK.

1914			Aug.			
20	Coin	2500. √		20	Seattle	√ 2000. √ √
25	Seattle	15000 ×		20	R.	?48000.
26	D. H. Seattle	1000. √		21	Tacoma	√ 5000. √ √
31	R.	12500 ×		21	Seattle	×15000.
4	R	9500 ×		25	R	√ 160.38 √
5	D.	1000 √		25	Seattle	√12500. √
12	D.	3000 √		26	R	√ 255.95 √
15	D.	24050 ×		26	R	√ 358.10 √
16	R. (Dft.)	4000 √		26	Seattle	√ 3795 √
17	D	1000. √		27	R	√ 147.25 √
	Bal.	27948.91		27	Seattle	√ 2000. √
				28	R	√ 147. √
				29	R	√ 216.60 √
				31	R	√ 52. √
			9	1	R	√ 56.50 √
				1	Tacoma	√ 2000. √
				1	"	√ 4000. √
				2	R	√ 338.30 √
				2	R	√ 94.65 √
				5	R	√ 377.18 √
				9	Coin Seattle	√ 5000. √
		101498.91				101498.91

(Filed Dec. 15, 1915.)

(Plaintiff's Exhibit 5, Transc. of Record, p. 158.)

Referring to exhibit 4, made up from the records of the United States National Bank, it will be seen that the item of $55,000, for which the United States National Bank is debited, is disputed, and also the items at the foot of the debit side, being the remittances to Seattle for Tenino of $6000, $2000, and $2000, respectively, are also in controversy. On the right hand side there are three items of stock sold, one of $1100, one of $400, and one of $330, which are conceded by appellant to be error. (See testimony of Frank P. McKinney, pp. 60 and 61, Transc. of the Record.) The $55,000 item over which there is controversy and which is preceeded by a cross should be $50,000. This was the original $50,000 credit, but it was changed to $55,000, because the officials of the Olympia Bank & Trust Company conceived the notion after they had organized their bank and received their credit of $50,000 from the United States National Bank, to add ten per cent to their stock subscriptions and create a surplus (See testimony of Frank P. McKinney, pp. 60 and 61, Transc. of the Record) and (testimony of W. Dean Hays). Correcting exhibit 4 so as to coincide with the corrections just mentioned, would leave the statement shown on plaintiff's exhibit No. 4 correct, except that the balance due the Olympia Bank & Trust Company from the United States National Bank would be $82,169.20. (Testimony of Frank P. McKinney, p. 59, Transc. of the Record.) By consulting exhibit 5, being the statement made by the receiver of the United States National Bank, it will be seen that on

each side of the ledger are two $15,000 items, which are both marked by a cross. Both of these items are unexplained, and in as much as they balance each other no attention was paid to the same, and it is not known, and it is unnecessary to know what they signify. It will be seen on the debit side that there are three items over which there is a controversy, to-wit:

August 31 ..... $12,500
September 4 9,500
September 15 24,050

These items are charged up against the Olympia Bank & Trust Company, and it is readily seen they represent the two drafts aggregating $36,450, and also the item of $9,500 represented by the Blumauer notes. There is nothing in the statement, plaintiff's exhibit 5, of the United States National Bank, that shows anything concerning the ten thousand dollars remitted from the Olympia Bank & Trust Company for the United States National Bank on account of Tenino. If the contention of appellant is correct here, there should be deducted from the charges against the Olympia Bank & Trust Company the two drafts aggregating $36,450, and there should be added the $10,000 on account of the Tenino transaction, and the court can at once see that it will make the statements between the two banks much different, and will verify the testimony of Frank P. McKinney referred to hereinbefore and render his conclusion about the amount due the Olympia Bank & Trust Company correct.

A curious thing to note about exhibit 5 is that one of the drafts, to-wit: the one for $24,050, is charged against the Olympia Bank & Trust Company of date September 15th, 1914, while the draft for $12,500 is charged as of date August 31, 1914, and yet the testimony shows that both of the drafts were brought by Gilchrist from Centralia to Olympia on the 15th day of September, 1914, just prior to the failing of the banks, and that they were drawn in Mr. Hays' residence in Olympia, and the $12,500 draft, which was introduced in evidence shows that it was dated on September 15, 1914. (See intervenor's exhibit 4, p. 171, Transc. of the Record.) This is a striking circumstance to show the manipulation of the said United States National Bank.

SPECIFICATIONS OF ERROR IN THE CASE OF FRANK P. McKINNEY AS RECEIVER OF THE OLYMPIA BANK & TRUST COMPANY, A CORPORATION, APPELLANT, VS. UNITED STATES NATIONAL BANK OF CENTRALIA, A CORPORATION, AND A. R. TITLOW AS RECEIVER OF THE UNITED STATES NATIONAL BANK OF CENTRALIA, APPELLEES, AND C. S. REINHART AND C. WILL SHAFFER, STOCKHOLDERS OF THE OLYMPIA BANK & TRUST COMPANY, A CORPORATION, FOR THEMSELVES AND ALL OTHER STOCKHOLDERS OF SAID COMPANY, APPELLANTS, VS. UNITED

STATES NATIONAL BANK OF CENTRALIA, A CORPORATION, AND A. R. TITLOW AS RECEIVER OF THE UNITED STATES NATIONAL BANK OF CENTRALIA, A CORPORATION, APPELLEES.

1. The court erred in denying the claim of the appellant in the sum of $36,550 (being the amount of the two drafts), and in denying and dismissing the appellant's action therefor.

2. The court erred in denying the claim of the appellant for ten thousand dollars remitted by the Olympia Bank & Trust Company, at the request of the United States National Bank of Centralia, for Tenino, and in dismissing appellant's action therefor.

3. The court erred in requiring the appellant to accept a return of the notes aggregating the face value of $11,450, secured as follows:

Note of F. G. Blakeslee	$1000.00
Note of W. A. Weller	1100.00
Note of C. Will Shaffer	1100.00
Note of C. S. Reinhart	1650.00
Note of Charles E. Hewitt	1100.00
Note of I. M. Howell	5500.00

when the said notes would have been retained as the property of appellee and the appellant permitted to recover according to the demand of his complaint.

4. The court erred in cancelling and holding that the credit of $48,000 in favor of the appellant of which $36,550 set forth in the appellant's first cause

of action formed a part and certified in favor of the Olympia Bank & Trust Company and in not allowing the same to appellant.

5. The court erred in refusing to allow all the claims on the part of the appellant and intervenors to preferred and prior liens against the assets in the hands of the appellee receiver, when the said claims should have been allowed as preferred claims.

6. The court erred in allowing the appellant a general claim in the sum of $25,998.91 only, and no more on the accounting herein when the appellant should have been allowed the sum of $83,998.91.

7. The court erred in requiring the appellant to pay its own costs.

The foregoing specifications of error all arise out of the decree (pp. 33, 34, and 35, Transc. of the Record) and other records heretofore and hereinafter referred to.

ARGUMENT.

We naturally discuss the specifications in the order outlined.

SPECIFICATION OF ERROR NO. 1.

The claim of appellant for $36,550 represents funds of the Olympia Bank & Trust Company that were taken from the said bank to pay the private indebtedness of W. Dean Hays. The court, by reading the statement of the case and consulting the record, will see that there is no dispute but what Hays gave

his notes to the United States National Bank, and received therefrom $36,550 with which to buy stock in the Olympia Bank & Trust Company. In other words, Hays was a subscriber to the stock of the Olympia Bank & Trust Company to the extent of $36,550. This, of course, he had to pay in money to the Olympia Bank & Trust Company. Instead of giving the money direct he gave his notes for this sum to the United States National Bank, and the United States National Bank paid the money in the form of a deposit covering it, and the $11,450 of other notes, and $2000 in cash, or $50,000, for which it gave a certificate of deposit, and which enabled the Olympia Bank & Trust Company to obtain its charter and commence business. Now the relation between Hays and the United States National Bank in such a deal was that of borrower and lender. In other words, Mr. Hays borrowed $36,550 from the United States National Bank, and gave his notes therefor. The testimony shows that Gilchrist was the active manager and first vice-president of the United States National Bank, and had full power and authority to direct its business and to make loans for his bank. He saw fit to loan Hays $36,550 and take his notes therefor. The agreement was as simple as it could be. Hays individually procured $50,000 from the United States National Bank, and with this $50,000 he bought $36,550 worth of stock for himself and loaned the other stockholders $11,450, with which to buy stock, in a bank that was organized after the money was borrowed. And in addition to this, $2000

was paid for stock in cash. Hays took notes from the other stockholders in the sum of $11,450 and assigned them to the United States National Bank, and gave his own note in the sum of $36,550. Any claim that the United States National Bank would have with relation to these notes would therefore be against Hays as to the $36,550 personally, and against the other stockholders for the $11,450, and not against the Olympia Bank & Trust Company. When Mr. Hays, therefore, issued the two drafts and took up these two notes he had no more authority or right to take the money out of the bank (which he did) and pay the same, than he would to commit highway robbery, because the money of the bank was not his. This, however, was just what he did. He took the money belonging to the Olympia Bank & Trust Company to pay his own private indebtedness. The law is very plain in regard to such transactions. Gilchrist, the manager of the United States National Bank, knew when he took the drafts from Hays that he (Hays) was taking the same to pay the private indebtedness of Hays to his (Gilchrist's) bank, and he knew that Hays was not using his own money, but was taking the money of the bank to pay his (Hays') indebtedness. It must be remembered that the other stockholders and directors of the Olympia Bank & Trust Company knew nothing about the deal by which Hays obtained the money from the United States National Bank to open the Olympia Bank & Trust Company. They even did not know that their own notes had been assigned to

the United States National Bank by Hays. None of them knew that the drafts heretofore mentioned had been issued by Hays, and each supposed that he was the only one borrowing the money he was borrowing to buy his stock, and that he was borrowing the money from Hays, and none of them knew of Hays issuing the drafts and taking the funds of the bank to pay his own personal indebtedness. (See testimony of C. Will Shaffer, p. 91, Transc. of Record; C. S. Reinhart, p. 99, Transc. of Record; W. T. Cavanaugh, p. 100, Transc. of Record; Charles E. Hewitt, p. 101, Transc. of Record; I. M. Howell, p. 104, Transc. of the Record.)

It will be seen also that these men were all men of standing: I. M. Howell was Secretary of State of the State of Washington; Shaffer was Law Librarian; Reinhart was Clerk of the Supreme Court of the State of Washington; while Cavanaugh had been postmaster, and Charles E. Hewitt was a merchant.

See the following, which we think is applicable:

> "Where a transaction between the president of a bank and defendants, in which the president paid defendants money belonging to the bank, which he wrongfully appropriated, was concealed from the bank, and the mere statement of the fact to the directors would have disclosed the fraud, defendants are liable to the bank for the money received. In the absence of special authority, conferred by the directors of the bank

by resolution, acquiescence, or implied assent, the president of the bank has no authority to draw drafts on its funds in payment of personal debts. That the president was permitted to draw them through culpable negligence of the directors is unavailing, where there is no finding of such negligence, or that defendants were influenced thereby to accept the drafts. But if the directors of a bank, trusting the president's integrity, or individual responsibility, authorized him to use drafts drawn on its funds for private purposes, whether paid for at the time or not, any loss resulting from the misuse of such authority would fall on the bank, and not on the third person, who had taken the drafts for value and in good faith, which, in such case, would be determined by the established rules governing the transfer of negotiable paper.

CASHIER.—A bank may recover funds misappropriated by its cashier from one receiving them with knowledge of the misappropriation. Where the cashier of a bank pays his individual debts by entering the amount to the credit of his creditor, the bank may recover of the creditor the money it may pay out on checks drawn on the faith of the unauthorized credit."

Michie on Banks and Banking, Vol. 1, p. 856.

A leading case, and indeed the leading case to be found always in a discussion of this feature of the law, is *Lamson v. Beard,* 36 C. C. A. 56. As bearing

on the question of the payment of an individual debt of a bank officer with a bank's funds, we respectfully cite the court to the following cases and citations.

Payment of Individual Debt of Bank Officer with Bank's Funds.

Cited in *Hier v. Miller,* 68 Kan. 262, 63 L. R. A. 956, 78 Pac., holding bank cashier without implied authority to bond bank by entry as deposit amount of his indebtedness in customer's pass book; *Cals v. Chase, Nat'l Bank,* 43 C. C. A. 498, 104 Fed. 216, holding clear and satisfactory proof required to justify finding of cashier's implied authority to draw cashier's draft in payment of individual debt, from acquiescence of directors; *Campbell v. Manufacturers Nat. Bank,* 67 N. J. L. 308, 91 Am. St. Rep. 438, 51 Atl. 497, denying bank's liability for cashier's use of funds for individual debt because of failure to detect transaction when defect not discoverable by ordinary inspection; *Home Sv. Bank v. Otterbach,* 135 Ia. 160; 124 Am. St. Rep. 267, 112 N. W. 769, holding the burden is on one dealing with a bank cashier who uses bank funds for his own benefit to show facts estopping the bank from denying authority; *Newburyport v. Spear,* 204 Mass. 151, 90 N. E. 422, holding it no defense in an action for money received on a check drawn on bank account of city by treasurer without authority on payment of personal debt that defendant paid money to others, retaining

only the amount of commission; *Mendel v. Boyd,* 3 Neb. (unof.) 479; 91 N. W. 860, holding to same effect; *Kitchens v. Teasdale Commission Co.,* 105 Mo. App. 469, 79 S. W. 1177, holding the carelessness of bank directors is no defense to defendant, a commission company, receiving funds misappropriated by cashier by means of drafts on bank's correspondents which defendant company collected; *Hawkeye Gold Dredging Co. v. State Bank,* 157 Fed. 263, on right of a corporation to recover from a bank fund wrongfully transferred to it by corporation's treasurer; *Langlois v. Gragnon,* 123 La. 457, 22 L. R. A (N. S.) 416, 49 So. 18, holding bank not liable where cashier notified his own creditor that a sum had been placed to his credit to pay debt.

Cited to footnote to *Hier v. Miller,* 63 L. R. A. 952, which sustains right of bank to recover amount paid out on checks drawn upon the faith of an unauthorized entry by the cashier of the amount of his individual debts as a credit on the pass book of his creditor.

Cited in Notes (52 L. R. A. 796) on liability of bank or other depository or of drawee, for taking deposit of agent, fiduciary or other representative to pay his own debt (31 L. R. A. (N. S.) 171) on right of taker of commercial paper of corporation for officer's individual debt.

Distinguished in *First National Bank v. Byrnes,* 61 An. 466, 59 Pac. 1056, denying

agent's liability for teller's misappropriation of bank's funds by drafts wrongfully issued and sent to company in distant city.

We suggest a careful reading of the case of *Lamson vs. Beard* will convince anyone that the transaction here was wholly unauthorized and void, and that the appellant as receiver of the bank has a right to recover the money so illegally paid. We maintain that in this case the court must require each bank to meet its legal obligations and give each bank its legal due and require an accounting upon such basis. Hays was indebted to the United States National Bank on his own notes for $36,550. He took this amount of money out of the coffers of the Olympia Bank & Trust Company and paid his private indebtedness. Under the authority of *Lamson v. Beard,* the Olympia Bank & Trust Company had a right to commence and maintain an action for the recovery of the money illegally taken from it by its cashier to pay his own private debts, and also, in accordance with what is held in the said case of *Lamson v. Beard,* the receiver of the Olympia Bank & Trust Company has a right to recover the same also.

See also the following:

"A bank or its receiver may recover funds wrongfully used by an officer of a bank to pay the officer's own debt (and this notwithstanding the negligence of the directors.)"

Kitchens v. Teasdale Commission Co., 79 S. W. 1177, 105 Mo. App. 463.

"Where the president of a bank wrongfully appropriated the bank's funds to a personal use, by means of drafts, the bank is not estopped by the president's course from denying his authority to draw such drafts."

Lamson v. Beard, 45 L. R. A. 822, 94 Fed. 30. 36 C. C. A. 56.

"A bank is presumed to know only what its officers know when officers act within the scope of their authority, hence it is not chargeable with knowledge of his fraudulent use of the bank's funds for his private purposes."

Knobelock v. Ger. Sav. Bk., 27 S. E. 962, 50 S. C. 250.

"Where the cashier of a bank pays his individual debt by entering the amount to the credit of his creditor the bank may recover of the creditor."

Heir v. Miller, 75 p. 77, 68 Kan. 258, 63 L. R. A. 952.

Ft. Dearborn, Neb. v. Seymore, 73 N. W. 724, 71 Minn. 81.

Kitchens v. Teasdale, 105 Mo. App. 463, 79 S. W. 1177.

"The general authority of a cashier manager of a bank does not authorize him to issue drafts for himself or for his private use."

Mendel v. Boyd, 99 N. W. 493, 71 Neb. 657, 3 Dec. Dig. Banks & Banking 117, 6 Cent. Dig. Banks & Banking 288.

The contract had not been repudiated (indeed could not be) before the insolvency of the two banks. The receiver cannot repudiate the agreement now. Supposing that neither of the banks had gone into the hands of a receiver, and supposing that Hays had taken the money he did to pay his own notes, would the court hold that the Olympia Bank & Trust Company could not maintain an action to recover the money so illegally taken and paid to the United States National Bank? The answer is that it would not. Suppose that Hays had refused to pay his notes. Could the United States National Bank maintain an action against the Olympia Bank & Trust Company for $36,550? Not for an instant! The mere fact that the two banks went into the hands of receivers does not change their contractual status. The duties of a receiver are to close and settle up the affairs of their defunct banks and enforce their contracts. Thus neither has a right to disavow or set aside the contracts or legal rights of their respective banks. The contracts are as enforcible now as they were before insolvency.

Tilford v. Atlantic Match Co., 144 Fed. 924.

King v. Pomeroy, 121 Fed. 287, 58 C. C. A. 209.

Schultz v. Phenix Ins. Co., 77 Fed. 375.

Morris v. Lee, 30 Fed. 298 (affirmed in 141 U. S. 132).

"The general rule is that a receiver takes the rights, causes and remedies which were in the corporation, individual or estate whose receiver

he is, or which were available to those whose interests he was appointed to represent." 34 Cyc. 388.

And of course the contra is true that he is subject to the obligations on the part of the corporation for which he becomes receiver. It cannot, it seems to us, be successfully contended that the contractual status of these parties can be set aside, and we most strenuously urge that the appellant is entitled to prevail as to the cause of action upon the $36,550. There is another feature of this specification of error, which is ratification by reason of failure to rescind the contract in toto, but this will be discussed in connection with Specification No. 3.

SPECIFICATION OF ERROR NO. 2.

This relates to the $10,000 claim for money remitted for the State Bank of Tenino. The evidence is very plain that the Olympia Bank & Trust Company was not indebted to the State Bank of Tenino, and there is no controversy over the fact also that the United States National Bank was always indebted to the State Bank of Tenino. (See testimony of Isaac Blumauer, pp. 80 to 87 inc., Transc. of the Record.) There is no dispute over the testimony either that the Tenino bank called on the Centralia bank for money, at the time that these $6000, and the two $2000 remittances were made. The United States National Bank instead of remitting this money itself,

requested the Olympia Bank & Trust Company to remit, and the Olympia Bank & Trust Company did remit for the United States National Bank. This, it would seem plain to us, makes the United States National Bank indebted to the Olympia Bank & Trust Company, in each instance, when the United States National Bank was called upon to pay these items, aggregating $10,000 to the State Bank of Tenino, as the said United States National Bank procured the Olympia Bank & Trust Company to pay the same. There cannot, it seems to us, be any contention but that the United States National Bank under the testimony in this case is indebted to the Olympia Bank & Trust Company for the said $10,000.

However, if in any event, the court can ignore the legal obligation as to this ten thousand dollars, it must give the appellant relief against the State Bank of Tenino in that amount, for in any event it appears that the Tenino bank received the benefit of the $10,000, and the Olympia Bank & Trust Company was never indebted to it. The testimony of the receiver of the State Bank of Tenino shows this conclusively. (See testimony of Roy A. Langley, pp. 63-65, Transc. of Record, and pp. 107-111 inc., Transc. of the Record. See also testimony of Isaac Blumauer referred to hereinbefore, and also the testimony of Gilchrist.)

SPECIFICATION OF ERROR NO. 3.

This involves the returning of the notes for $11,450, being the notes of the stockholders other than W.

Dean Hays. These notes were holden by the United States National Bank at the time it went into the hands of a receiver. These notes were never offered to be returned until at the trial of the cause. As has been pointed out there was an attempt, just prior to the failure of the two banks, on the part of the United States National Bank to repudiate the deal between it and Hays, and by which Hays received the credit of $50,000, to the extent only of the $36,550. In other words, it was attempted to repudiate the deal in part and let it stand in part. The United States National Bank affirmed the deal so far as the notes of Blakeslee, Weller, Shaffer, Reinhart, Hewitt and Howell were concerned, and the $2000 cash that was furnished, but attempted to repudiate the deal so far as the two notes of W. Dean Hays were concerned. This cannot be done. This specification of error also bears upon Specification of Error No. 1. The contract was ratified by the United States National Bank up to the very moment of its insolvency and during the period of over a month, representing the life of the Olympia Bank & Trust Company, the course of dealing between the two banks which they were recognizing and carrying on, the result of which in the finality, eliminating all of the notes and the $50,000 (less $2000 in cash) resulted in a net gain of $45,498 to the United States National Bank. Just prior, however, to the insolvency of the United States National Bank it attempted to repudiate the deal as to the $36,550 (or rather to circumvent it by the issuance of the two drafts), but as to the $11,450 of notes

represented by the other stockholders, no attempt was made to repudiate or interfere with the agreement. The testimony shows that the officers of the United States National Bank were willing to retain these notes, because they were from good and reliable men, and men upon whom the bank had reliance. In fact the first that was ever heard of the return of these notes was when the present receiver of the United States National Bank answered in this case, and the notes were retained by the receiver at all times and were retained by the United States National Bank and were never surrendered or offered to be surrendered or released until the action was tried in December, 1915, over a year after the failure of the bank. A contract cannot be rescinded in part and affirmed in part. It must be rescinded in toto.

> "A recission must be in toto. He cannot affirm a contract in part and repudiate it in part. He canont accept the benefits on the one hand while he shirks the disadvantages on the other hand." 9 Cyc. 438.

Hunter v. Stembridge, 17 Ga. 243.

Bell v. Keeper, 39 Kan. 105, 17 Pac. 785

Brill v. Rack, 15 S. W. 511.

Barrie v. Earle, 58 Am. Rep. 156.

Merrill v. Wilson, 66 Mich. 232.

Estus v. Reynolds, 75 Mo. 563.

Burnham v. Spooner, 10 N. H. 532.

Butler v. Prentiss, 71 N. Y. St. 383.

Grymes v. Sanders, 93 U. S. 51.

See the following:

> "Where a party desires to rescind upon ground of mistake or fraud he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose."
>
> *Grymes v. Sanders, et al.,* 93 U. S. 55-62.

However, there was no attempt at recission at all as the evidence is disclosed in the record herein. When Gilchrist, the active manager and vice-president of the United States National Bank, became fearful that the bank examiner would not pass the two Hays notes he sought to obviate the situation by taking the drafts for the same, and he attempted by this means to take money of the Olympia Bank & Trust Company for the individual debts of Hays. As a matter of fact he never went to the extent of ever marking the drafts paid, and they were never returned to the Olympia Bank & Trust Company as they should have been, showing payment. Indeed the only effort to show that they were paid was the charge on the books of the United States National Bank of the items against the Olympia Bank & Trust Company. The receiver cannot repudiate the agreement and now return the notes of the other stockholders. More than that, if these notes are to be re-

turned by the receiver of the United States National Bank to the Olympia Bank & Trust Company it is equivalent to taking funds of the Olympia Bank & Trust Company to pay the private indebtedness of Messrs. Blakeslee, Weller, Reinhart, Shaffer, Hewitt and Howell, and is violating the principle of law enunciated in *Lamson vs. Beard, supra.*

SPECIFICATION OF ERROR NO. 4.

For reasons assigned and urged as to the other specifications of error, the court erred in cancelling the $48,000 credit of which the $36,550 set forth in appellant's complaint formed a part. In other words, the court required the return of the notes of the other stockholders of the Olympia Bank & Trust Company to the receiver of said company and held that the receiver could not recover for the $36,550. In other words, the court sets aside the whole deal by which the Olympia Bank & Trust Company acquired the means upon which to do business. This, the court had no power to do, as we conceive under the evidence.

The court proceeded upon the theory that the whole transaction was fraudulent and that he would set aside the whole transaction by which these notes were given and the credit obtained. If the court had gone further, and had placed the parties back in statue quo, it could be urged that he did equity in the premises, but this the court did not do. By consulting plaintiff's exhibit 5 (p. 158, Transc. of the

Record), being a statement made by the receiver of the United States National Bank himself, it will be found that the total amount of the receipts of the United States National Bank from the Olympia Bank & Trust Company was $101,498.91. Take from this the $48,000 representing the credit obtained by the notes, will leave $53,498.91. Take from this $51,000 which appears on both sides of the statement, and which, as we have said before, is unexplained, and this leaves $38,498.91. Add to this $19,500, being $10,000 for the amount due on account of money remitted to the State Bank of Tenino (and which does not show in this statement) and $9,500 for the Blumauer notes (which do not appear in this statement) and we have $57,998.91. Take from this $12,500, which is the total amount of the remittances to the Olympia Bank & Trust Company and the payments of drafts by the United States National Bank, and we have a balance of $45,498.91. As we have heretofore said, there can be no doubt but what appellant is entitled to the ten thousand dollars on the item for remittances to Tenino, but for the sake of argument we take this out and still it leaves $35,498.91. This sum represents hard cash and money paid out; and there can be no contention but that the United States National Bank profited by reason of the organization of the Olympia Bank & Trust Company in said sum. The two items, one of $12,500 and one of $24,050, are not considered, being the two drafts, and involved in the $48,000 transaction.

If the court is to place the parties back in statu

quo, as nearly as possible, to-wit: as nearly where they were before the Olympia Bank & Trust Company was organized, this sum—either the $45,498.91, or the $35,498.91, as the case may be—should be given back to the Olympia Bank & Trust Company, and this sum would be a preferred claim, because if the court is to wipe out the whole transaction as fraudulent, this last named amount represents money that was fraudulently filched from the people who organized the Olympia Bank & Trust Company, and would be the same as stolen money. The court cannot set aside this whole transaction without the organizers of the Olympia Bank & Trust Company are placed in statu quo as nearly as it is possible so to do. This is a fundamental rule and for the sake of refreshing our memories, we refer the court to the following citation from Cyc. and cases cited:

> "The contract can only be rescinded where it is possible to put the parties back in their original condition and with their original rights. A contract voidable for fraud cannot be avoided when either party cannot be restored to his status quo, for a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded in toto, it cannot be rescinded at all." 9 Cyc. 437.

> "It follows as a general rule that in order to rescind a contract for fraud, the party defrauded must restore or offer to restore the consideration which he has received under the contract.

> That is, where a person has been induced by fraud to buy goods, in order to avoid the contract, upon the discovery of the fraud, he must return the goods; and if he does not, or cannot do so, he must pay the price, or at least the value of the goods. After consuming the goods wholly or in part the buyer cannot avoid the contract by which he obtained them, because he can no longer return them." 9 Cyc. 438.

Had there not been any Olympia Bank & Trust Company at all, and had it not been for the action of the United States National Bank through its active manager and vice-president, Mr. Gilchrist, in loaning Mr. Hays the money to organize the Olympia Bank & Trust Company the sum of money mentioned above would not have been obtained by the United States National Bank. This whole sum of money was obtained by the United States National Bank from the Olympia Bank & Trust Company through the manipulations by which the Olympia Bank & Trust Company was organized, and while, as we have heretofore said, we think the court has not the power to undo the legal obligations and relations running from the United States National Bank to the Olympia Bank & Trust Company, and consequently from the receiver of the United States National Bank to the receiver of the Olympia Bank & Trust Company, yet, if the court is to undo these relations, and set them aside, and hold them for naught, it must take the other alternative and place the parties as nearly in

statu quo as it is possible so to do—that is, place them back as nearly as possible where they were before.

SPECIFICATION OF ERROR NO. 5.

This specification needs but to be stated to emphasize the right of the appellant thereto. The money that was taken from the funds of the Olympia Bank & Trust Company to pay a private indebtedness of W. Dean Hays was like stolen money, and is therefore a preferred claim.

SPECIFICATION OF ERROR NO. 6.

As has been pointed out, the court only allowed the appellant a general claim of $25,998.91, and no more. If the position taken by the appellant heretofore upon the several specifications of error is correct, the appellant is entitled to a claim of $83,998.91 and the conclusion that the appellant is entitled to such sum necessarily flows from the presentation of the other assignments of error herein.

SPECIFICATION OF ERROR NO. 7.

The court, although the appellant prevailed to some extent in the court below, to-wit: to the extent of $9,500, yet refused to allow appellant his costs. This seems to us erroneous and that the appellant was entitled to his costs.

The appellee has caused to be certified the decision of the honorable district judge on the denial of the

petition for re-hearing. This, of course, is the simple opinion of the court and does not amount to a finding, and no reference therein as to the testimony, except that shown in the transcript of the record, can be considered as a finding or as evidence in the case.

See the following:

Townsend v. Beatrice Cemetery Co., 70 C. C. A. 521.

Pacific Sheet Metal Works v. Californian Canneries Co., 91 C. C. A. 108.

For the reasons urged hereinabove, we respectfully submit that the judgment of the lower court should be reversed, and judgment be rendered as directed by this court.

P. M. TROY,
Solicitor for Appellant.

STATEMENT OF THE CASE OF ROY A. LANGLEY, AS RECEIVER OF THE STATE BANK OF TENINO, VS. UNITED STATES NATIONAL BANK OF CENTRALIA, A CORPORATION, AND A. R. TITLOW, AS RECEIVER OF THE UNITED STATES NATIONAL BANK OF CENTRALIA.

It is alleged in the bill of complaint, not denied in the answer, and therefore admitted, and the undisputed evidence shows that the State Bank of Tenino and the United States National Bank of Centralia closed their doors on account of insolvency on the 21st day of September, 1914, and that for many years prior thereto said State Bank of Tenino and said United States National Bank of Centralia were doing business with each other and had mutual accounts and deposits, one with the other, and were so doing business up to the time of closing their said doors. (Transc. of Record, pp. 180, 182.) The bill of complaint further sets forth that the complainant has made a "careful examination of the books and accounts of both banks, and that there is now due and owing from said United States National Bank of Centralia to said State Bank of Tenino the sum of $4,953.08, so far as complainant can determine from the investigation and information that plaintiff has been able to obtain." (Transc. of Record, p. 183.) This allegation was denied in defendant's answer. (Transc. of Record, p. 185.) The bill of complaint prayed:

1. For an accounting on behalf of said defendant.

2. That after the amount shall have been determined by such accounting due complainant by defendant, for a judgment allowing complainant's claim in the amount so determined.

3. For an order directing said Titlow, as receiver, as aforesaid, to pay complainant the amount of any and all dividends so declared.

4. For such other and further relief as to the court shall seem equitable and just.

5. For complainant's costs and disbursements herein. (Transc. of Record, p. 184.)

When this cause went to trial there were several items in dispute between the receiver of the State Bank of Tenino and the receiver of the United States National Bank of Centralia, but during the course of the trial the differences between the two receivers were ironed out except as to two items, one of which was a note of $5,000.00 made by W. Dean Hays, payable to the United States National Bank, and the other consisted of what may be termed the Blumauer transaction with the Merchants' National Bank of Portland, consisting of four drafts, one in the sum of $1,000.00 and the other three for $500.00 each. (Transc. of Record, p. 141.)

NOTE OF W. DEAN HAYS FOR $5,000.00.

Apparently the first negotiation in regard to the indebtedness, evidenced by this note, is a letter from

W. Dean Hays addressed to C. S. Gilchrist, vice president of the United States National Bank, under date of July 24, 1913. (Defendant's Exhibit B, Transc. of Record, p. 177.) It seems clear from this letter, and the testimony generally, that on that date W. Dean Hays personally owed the United States National Bank of Centralia $2,000.00, evidenced by a promissory note in that sum, and that he was proposing to make a new note to the bank for $5,000.00. Hays' offer was that $2,000.00 of the $5,000.00 should be used to retire the old note and the remaining $3,000.00 should be carried on the books of the United States National Bank of Centralia as a special deposit to the credit of the State Bank of Tenino, against which the State Bank of Tenino would not draw. It seems equally clear that this arrangement was only partially carried out. The new note for $5,000.00 (the note here in dispute) was in fact made by Hays and received by the United States National Bank. The old note for $2,000.00 was cancelled and the remaining $3,000.00 was placed to the general credit of the State Bank of Tenino in an open account existing between the two banks. No special deposit was made as suggested in Hays' letter. This money was drawn by Hays on drafts of the State Bank of Tenino on the United States National Bank and the $3,000.00 thus drawn was used by Hays for his private purposes. The only persons who were familiar with this initial transaction called as witnesses at the trial were W. Dean Hays, the maker of the note and manager of the State Bank of Tenino,

to either June, 1914 (Transc. of Record, p. 67), or August, 1914 (Transc. of Record, p. 81) and C. S. Gilchrist, a director and vice president of the United States National Bank. (Transc. of Record, p. 114.)

Mr. Hays, on cross-examination by Mr. Owings, described this transaction as follows: That he had an obligation with the United States National for some little time prior to its insolvency in the sum of $5,000.00, being a promissory note of the ordinary kind used by the bank and on the bank's own printed form and payable to the bank. (Transc. of Record, p. 77.) And again, on the cross-examination by Mr. Goodale, as follows: $2,000.00 of the $5,000.00 was applied to the payment of witness' personal and previously existing $2,000.00 note which was in the United States National Bank and the remaining $3,000.00 was placed on the books of the United States National Bank and of the books of the State Bank of Tenino to the credit of the State Bank of Tenino in the United States National Bank and to the debit of the United States National on the books of the State Bank of Tenino. Of course, the note was increased to $5,000.00 and the remaining $3,000.00, which was credited by the United States National to the Bank of Tenino was drawn by witness, not by the Tenino Bank, and was certainly used by witness. The United States National would simply credit the State Bank of Tenino with this remaining balance for witness' use and he would use it, and witness did use it. (Statement of Facts, p. 80.)

Mr. Gilchrist, on cross-examination by Mr. Owings, described this transaction as follows: "The $5,000.00 note sent to us in the ordinary course of business with all of the notes that we took from the State Bank of Tenino was credited to the State Bank of Tenino and the $5,000.00 went to the credit of the State Bank of Tenino. The original note, when it was sent down, came up from the State Bank of Tenino as ordinary paper rediscounted. It was sent down in the same manner as other notes we had taken. It came directly from the State Bank of Tenino to us for credit. The note was not signed or executed in Centralia. The original note was made six months prior to that. The exhibit is the original of the note. Witness is not sure if the first note had the Tenino State Bank's endorsement. It was drawn on their paper when it came down. We often took paper from them with the endorsement of the bank. It was drawn on their form. The Centralia bank's form was used because it was not unusual for witness, when a note was long overdue, and he had made a special effort to get a new note and get new paper into the bank, to make out a note himself and forward it and ask that it be executed and returned promptly. Witness has not stated that the State Bank of Tenino was an endorser on the note. Witness thought it was the note of the State Bank of Tenino the same as he did any other note he took from there, and he took a great many from them. There wasn't any signature of the State Bank of Tenino nor was there on other notes

that he got in the same manner. Witness supposed this was an obligation of the State Bank of Tenino as well as an obligation of W. Dean Hays. The $5,000.00 was placed to the credit of the State Bank of Tenino and that was an open account that had existed for many years, and it fluctuated back and forth as the different transactions occurred. That is, an active, current, open account. There wasn't any special deposit of this $3,000.00 in any way. It did not come in the form of a C. D. It didn't go into the open account or bank account of a different character in any respect than this open account, but it was clearly understood between Mr. Hays and witness for what purpose it was meant and was the special account meant when he said special account. (Transc. of Record, p. 120.)

It likewise seems clear that after the $3,000.00 went to the credit of the State Bank of Tenino, and after Mr. Hays had appropriated $3,000.00 thereof to his own use and expended it, that the United States National attempted on two occasions to charge the $5,000.00 back to the State Bank of Tenino. The only witnesses who were familiar with different phases of these attempts were Hays, Gilchrist and Isaac Blumauer, the last named being manager of the State Bank of Tenino from either June or August, 1914, to the time of its failure, and president thereof from its organization to its failure.

Mr. Hays described that transaction as follows: It (the $5,000.00 note) was returned by the United

States National to the State Bank of Tenino when witness was in the bank, and witness understood that it was returned afterwards and the account of the State Bank of Tenino was charged by the United States National with the $5,000.00. The State Bank of Tenino refused payment on it and returned it to the United States National of Centralia with a statement of explanation that Mr. Gilchrist was going to buy witness' stock in the State Bank of Tenino and would take up that note and pay the difference and no liability was shown, or agreed to, by the State Bank of Tenino as a party or endorser or anything of that sort on that note, and if it was charged back again that was after witness left the active management of the State Bank of Tenino. (Transc. of Record, p. 77.)

Mr. Blumauer's testimony in this regard is as follows: The $5,000.00 note of Mr. Hays, which is held by the United States National Bank, was brought to witness' attention when he was in the State Bank of Tenino acting in the capacity of president. The note came down from the United States National. It was enclosed with a statement showing that it was charged up to our bank at Tenino and Mr. Hays was away at that time. Witness laid it on his desk, wanting to ask Mr. Hays something about it because witness knew nothing about it. Witness did not want to give Centralia credit for it until he saw Mr. Hays and knew what the transaction was, and thinks then a few days after that when Mr. Hays did come to Tenino he took it up with him. Mr. Hays says it should

not have been sent to our bank at Tenino. It should have been kept down there, and that he would attend to the matter. Witness believes Mr. Hays returned it and it was sent up a second time because he knew when the bank closed that the $5,000.00 note was on his desk and we didn't give Centralia credit for it because witness understood it was a private transaction between Mr. Hays and Mr. Gilchrist or between Mr. Hays and the United States National Bank. (Transc. of Record, p. 87.)

Mr. Gilchrist's testimony in regard to this transaction is as follows: That note was charged to their account, returned to Mr. Hays and he failed to credit it to our account, and we sent him our monthly statement and repeatedly asked him to send us an acknowledgment of the statement showing that the same was correct according to their books and that was not forthcoming, and finally he returned this note to us, asking as a special favor that we again credit the account and we did so temporarily covering a period of some two or three weeks, I should judge, when we again charged the note and sent it back to him. The note was forwarded by us in the ordinary course and sent back, and then we credited it back to Tenino; then we again sent it to Tenino and charged it to their account. He sent the note back for the purpose of getting his books in proper shape so that they would agree with ours anticipating a call from the bank examiner, and I wrote and told him we would be pleased to credit that draft so that he could get his books straightened up and checked up,

and as soon as that was done we immediately charged the note to his account and returned it to him. The general account that existed between the State Bank of Tenino and the United States National after the execution of this note was at times comparatively small and sometimes overdrawn, and after the execution of this note their books would show an overdraft of Tenino's account. There was deposited as collateral for this note some collateral of some coal company in Montana. Witness did not recall ever having received any stock in the State Bank of Tenino as collateral, but is not prepared to swear that he did not receive that as collateral. Could not positively testify that the stock in the coal company was issued to W. Dean Hays. (Transc. of Record, p. 122.)

According to the books of the United States National Bank the note was charged to the account of the State Bank of Tenino the first time on the 15th day of July, 1914, and was credited back on the 16th day of July, 1914. On the 24th day of July the State Bank of Tenino was again charged on the books of the United States National Bank with the $5,000.00. (Transc. of Record, p. 142.)

No entry of this transaction ever was made on the books of the State Bank of Tenino. (Transc. of Record, p. 108.)

THE $2,500.00 BLUMAUER-MERCHANT'S NATIONAL BANK OF PORTLAND TRANSACTION.

Isaac Blumauer lived at Tenino and Bucoda and

vicinity for thirty years, and was actively engaged all of the time in general merchandise and lumber and banking business. He had known Gilchrist, one of the original organizers of the United States National Bank, for twenty-five years. Gilchrist had been in the banking business in Centralia for probably twenty years and before that in Bucoda, and during all of that time Blumauer was a depositor with Gilchrist's banks. Gilchrist was very familiar with Blumauer's financial condition. (Transc. of Record, p. 86.) Prior to insolvency of the banks the Blumauer Lumber Company was indebted to the Merchant's National Bank of Portland in the sum of $2,500.00. This indebtedness was evidenced by the company's promissory note. When this obligation matured the Portland bank demanded payment. The Blumauer Lumber Company, being without funds to meet the demand, and being indebted to the United States National $30,000 or $40,000, Blumauer took up with Gilchrist the matter of meeting the note of the Portland bank with the idea of protecting Blumauer's credit. (Transc. of Record, pp. 84, 122.)

The testimony of Blumauer on the one side and of Gilchrist on the other as to the arrangements for paying this $2,500.00 note is, in certain essential particulars, irreconcilable. This far they seem to agree: that a draft for $500.00 in partial payment should be at once sent to the Portland bank. This draft was to be drawn by the State Bank of Tenino on the United States National Bank in favor of the Portland bank. Similar banking transactions followed

from time to time so that the same kind of drafts were drawn and sent to the Portland bank. The second draft was for $500.00, the third for $500.00 and the last for $1,000.00. The first draft was drawn while Hays was manager of the State Bank of Tenino.

Mr. Hays' testimony, as shown by the record, in regard to this, follows: Witness remembers that while he was cashier of the State Bank of Tenino a transaction where a draft was drawn by the State Bank of Tenino on the United States National in favor of the Merchant's National Bank in Portland for the purpose of paying a portion of the principal of the notes of Mr. Blumauer, of the Blumauer Lumber Company, or some of the concerns that Mr. Blumauer was interested in, as follows: Mr. Blumauer owed a note in Portland, had a letter from them stating that they wanted payment of five thousand dollars on it by a certain date, about three days following. I objected to loaning it out of the State Bank of Tenino funds, and he went down to see Mr. Gilchrist in Centralia, and after going there he called me up by telephone and told me he had made arrangements with Charlie Gilchrist for the money. He informed me that Mr. Gilchrist had requested that I send the United States National a draft stating for me to send a draft to Portland for five *thousand* dollars, and he would take care of it, which I did. There was an arrangement whereby the United States National was to really stand behind this draft. Never saw the draft after it was drawn and the same

was not entered up and made a charge in the books of the State Bank of Tenino. Witness thought it was sort of queer that that draft was sent up to us as a charge and returned it with a letter stating that it was his understanding that that was not to be charged to us, and it was taken back by the Centralia bank. Has never seen the draft since and does not know where it is. (Transc. of Record, pp. 97, 98.)

Mr. Blumauer's testimony, as shown by the record in regard to these four drafts, follows: Referring to the note of one of the companies in which witness was interested, payable to the order of the Merchant's National Bank of Portland, on two or three occasions payments were to be made and the Blumauer Lumber Company was not able to meet them, and taking the matter up with the United States National Bank, Mr. Gilchrist in particular, witness spoke to him about it and he told witness that he should issue drafts on the United States National Bank of Centralia and he would take care of them. The note of the Blumauer Company in the United States National, witness thinks, was twenty-five hundred dollars, and thinks the payments were made three five-hundred dollar payments and one of one thousand dollars. The bank in Portland insisted upon having the money and agreed to take payments of five hundred dollars each, three five hundred-dollar payments, and the balance, the fourth payment, a thousand dollars. These payments were to be made thirty, sixty days apart. It being without money, witness took it up with Mr. Gilchrist, of the

United States National Bank. He not wanting to extend us any further loans on account of not wishing to make excessive loans to the Blumauer Lumber Company wanted to handle it in that way so that the Tenino bank would issue the draft, and he would take care of it, and it would not appear as a note of the Blumauer Lumber Company. At this time the Blumauer Lumber Company was indebted to the United States National to such an extent that any more loans would have been considered excessive loans. The indebtedness may have been thirty or forty thousand dollars. Somewhere in that neighborhood. There was other paper—the Blumauer Logging Company. Mr. Gilchrist said he would take care of this loan. Witness' first talk was with Mr. Gilchrist in regard to it. And witness wanted to get a draft of five hundred dollars down to Portland in a hurry and did not wait till he could talk to Tenino, and thus he telephoned to Mr. Hays, and is under the impression that he told Mr. Hays to execute the draft to Portland so it would get away in the first mail, and telephoned him to do so and explained matters over the telephone. The other three drafts, witness thinks, were executed by him as president of the Tenino State Bank. Witness' understanding with Mr. Gilchrist was that as far as the bank of Tenino was concerned they would not be interested only that I should issue the draft on the Tenino bank and send it to Portland, and it was merely a matter between the Blumauer Lumber Company and the United States National Bank in Centralia, and wit-

ness believed that the drafts were just to be held in Centralia as a cash item against the Blumauer Lumber Company. The Tenino bank made no record of it at all, because after witness sent the drafts away that was all there was to it. No record was made of it. As near as witness could recall there was no record in the Tenino bank that those drafts were sent. (Transc. of Record, pp. 84, 86.)

Mr. Gilchrist's testimony, as shown by the record in regard to these four drafts, follows: Did not recall that Hays and Blumauer and himself were all together at a conference in regard to taking care of the obligations of the Blumauer Company in the transaction between the Tenino bank and the United States National and the Merchant's National in Portland, but thinks it was discussed by each of them at different times. Mr. Blumauer was a heavy debtor of the United States National at that time, and we were carrying them to quite an extent, and witness felt at that time that he desired to protect Mr. Blumauer's credit just as well as he could. Mr. Blumauer stated that the Tenino State Bank was not in a position to take this paper up. The plan was proposed that Tenino was to draw its usual drafts on the United States National, payable to the Merchant's National, and when that was returned to the United States National that they would carry it, and when these drafts were presented in the ordinary manner that we would protect the drafts, notwithstanding their account was overdrawn. As far as the Blumauer Lumber Company was concerned and so far as

Mr. Blumauer was concerned, witness supposed it was their intention to make their arrangements with the State Bank of Tenino covering this draft, and then in turn for the State Bank of Tenino to have us carry it for them, but it was never done. It was witness' idea of the plan that was agreed upon that when the drafts came back from Portland that it would be charged to Tenino's account. The drafts were to be sent by me to Tenino in the ordinary course of business, go back at the end of the month. The drafts went back to Tenino cancelled and returned with a statement at the end of the month. Our statements show the drafts and cancelled vouchers returned. Did not know, as a matter of fact they were found with the paper and files of the United States National Bank. The statement showed these particular drafts were returned. Could not testify as to whether any of the statements he sent down showing this transaction was accepted by Tenino. (Transc. of Record, pp. 122, 123.)

SPECIFICATIONS OF ERRORS IN THE CASE OF ROY A. LANGLEY, AS RECEIVER OF THE STATE BANK OF TENINO, VS. UNITED STATES NATIONAL BANK OF CENTRALIA, A CORPORATION, AND A. R. TITLOW, AS RECEIVER OF THE UNITED STATES NATIONAL BANK OF CENTRALIA.

1. The lower court erred in denying with prejudice the claim of complainant of the four drafts of

the State Bank of Tenino upon the United States National Bank aggregating the sum of $2,500.00. (Transc. of Record, p. 186.)

2. The court erred in denying with prejudice the claim of complainant on account of the certain note of W. Dean Hays in the sum of $5,000.00 charged to the State Bank of Tenino by the United States National Bank of Centralia. (Transc. of Record, p. 186.)

3. The court erred in holding and adjudging said note a good, valid and proper charge on the part of the United States National Bank of Centralia against the State Bank of Tenino and its receiver. (Transc. of Record, p. 186.)

4. The court erred when it allowed complainant a general claim against defendant as receiver in the sum of $5,511.13, in that it refused to allow complainant $2,500.00 in addition thereto, on account of the drafts mentioned in specification 1. (Transc. of Record, p. 186.)

5. The court erred when it allowed complainant a general claim against defendant as receiver in the sum of $5,511.13, in that it refused to allow complainant the $5,000.00 in addition thereto, on account of the note mentioned in specification 2. (Transc. of Record, p. 186.)

ARGUMENT OF THE CASE OF ROY A. LANGLEY, AS RECEIVER OF THE STATE BANK OF TENINO, VS. UNITED STATES

NATIONAL BANK OF CENTRALIA, A CORPORATION, AND A. R. TITLOW, AS RECEIVER OF THE UNITED STATES NATIONAL BANK OF CENTRALIA.

Specifications of errors Numbers 1 and 4 cover the same subject matter and will be discussed together, with the court's permission. They are both predicated on the decree of the lower court. (Transc. of Record, p. 186), and both pertain to the same point mentioned in the decree in different ways. In Paragraph 1, of the Decree, the claim of appellant "on account of certain drafts of the State Bank of Tenino upon United States National Bank aggregating the sum of $2,500.00" is denied with prejudice. In Paragraph 3, of the Decree, the lower court allows the appellant a general claim against the appellee in the sum of $5,511.13, and no more. Obviously, if the court committed error in denying appellant's said claim for $2,500.00, it committed error in not increasing by that amount the general claim it did allow.

The "Statement," *supra,* under the caption "The $2,500.00 Blumauer-Merchant's National Bank of Portland" covers these two specifications.

Appellant contends (1) that there is no evidence to support those portions of the decree and (2) if there is any such evidence, the evidence to the contrary overwhelmingly preponderates in appellant's favor, so that this court in considering the same will be clearly convinced that the lower court was in error in denying this claim.

This case being before this court on appeal from a decree entered in an equitable suit, questions of fact as well as law, will be reviewed.

Appellant claims, with confidence, that there is no testimony of any kind, character or description to justify the court's determination in this record, unless the testimony of Mr. Gilchrist (Transc. of Record, pp. 122, 123) and the drafts themselves do so. At the time Gilchrist gave his testimony he was serving sentence in the United States Penitentiary at McNeil's Island for the commission of a crime connected with the affairs of the United States National Bank. (Transc. of Record, p. 133.) The salient part of his version of these transactions (set out fully in the "Statement" herein) is that actuated by desire to protect Blumauer's credit and being informed by Blumauer that the Tenino bank was not in a position to take this paper up, the plan was proposed that Tenino was to draw its usual drafts on the United States National payable to the Merchant's National and when that (the drafts) was returned to the United States National, that bank would pay them notwithstanding their (Tenino's) account was overdrawn. (Transc. of Record p. 122.) Accepting this statement as a verity, would such transaction, as a matter of law, relieve the United States National from liability and fasten such liability on the State Bank of Tenino? If this question is answered in the affirmative, then there is evidence to support the decree as to these transactions, and the first subdivision of our contention is erroneous. We submit,

however, that this question should be answered in the negative. The plan, as described by Gilchrist, was conceived in fraud. The ultimate result from such plan was that Blumauer to meet a due obligation should receive the money from the United States National and then the United States National should get the money back from the State Bank of Tenino. Gilchrist knew that the State Bank of Tenino was without funds to make this loan. He was anxious to protect Blumauer's credit because Gilchrist's bank was carrying Blumauer for from thirty to forty thousand dollars. If Blumauer could not meet his obligations thirty or forty thousand dollars of his paper held by the United States National would have to be charged off its books. In view of the bank's subsequent failure, is it not fair to assume that if this amount of assets were in fact charged off, the bank would have failed? Thus the vital interest of Gilchrist is shown. Remember, this was a new transaction and a new additional credit, for Blumauer was to be established. The Tenino Bank did not have the money. Gilchrist's bank did. Under these facts a legitimate consummation of the deal would have been for Blumauer to make a note for the $2,500.00 to the United States National and to remit the money to the Portland bank. Of course, this was undesirable from Gilchrists' viewpoint, because the bank examiner's attention would be directed to the additional loan of $2,500.00 and that fact, considered with the further fact that Blumauer had other obligations to the bank in an excessive amount, would

undoubtedly cause trouble with the bank examiner. Such a transaction would of necessity have to appear on the books of the United States National as a loan. On the other hand, if the officers of the State Bank of Tenino could be induced to draw a draft of that institution on the United States National in favor of the Portland bank, then, so far as the bookkeeping record of Gilchrist's bank was concerned, no loan need be shown. On a call from the bank examiner, or the comptroller, Gilchrist could, if it became advisable, charge the returned drafts to Tenino's account, as he attempted to do, or could carry the transaction as a cash item and the examiner, or comptroller, would not be informed of an additional loan to one who was already an excessive borrower from the bank.

It is true that the drafts themselves would, standing alone, corroborate the plan testified to by Gilchrist. The State Bank of Tenino, as the drawer of the drafts, would be liable to the drawee, the United States National Bank, but the transaction established by these drafts are in no wise inconsistent with the plan as testified to by Blumauer, and therefore their corroborative force is destroyed.

Circumstances just as consistent with honesty and good faith as with a fraudulent intent are insufficient to prove fraud. *In re Hawks,* 204 Fed. 309, 213 Fed. 177.

Let us now discuss our second contention. There can, it seems to us, be no doubt in the court's mind

in considering this evidence that Blumauer's version is the truthful one. That is, after paying the Portland bank, his obligation was to the United States National, not to the Tenino bank, and that the United States National would take care of the indebtedness. This is proved beyond doubt by the uncontradicted proof that the Tenino bank did not have the $2,500.00 to loan Blumauer. If it had the money there was no earthly reason for conferring with Gilchrist in regard to the transaction. Blumauer could have borrowed the money from Tenino and remitted it to Portland, and the transaction would have been completed. Why should Blumauer have taken the matter up with Gilchirst. The necessity therefor was the lack of money of the Tenino bank. Blumauer says so. Hays says so. Gilchrist says that Blumauer told him so. In those transactions, did the Tenino bank receive any consideration or any benefit of any kind from this transaction sufficient to support a contractual liability? Certainly not! Did the United States National receive any such consideration or benefit? It certainly did! What was it? The payment of a pressing matured debt of a customer who was an excessive borrower from it, the impairment of whose credit would jeopardize thirty or forty thousand dollars of that customer's paper held by the bank. It must be remembered that this is a suit for an accounting between two receivers, trustees of their respective trusts, and the onus of these transactions must fall upon the depositors of one institution or the other. We submit that the equities are

with the appellant's trust as to these draft transactions and that the loss resulting therefrom should fall upon the appellee.

The principles of law here asserted are so elementary as to need no citation of authority. The vitiating effect of fraud is, of course, fundamental and has been recently recognized by this court.

Platten vs. Gedney, 221 Fed., 281, Reversed 224 Fed. 382, 140 C. C. A. 68, Amended 228 Fed. 338, 142 C. C. A. 630.

A court of equity will not aid parties in the consummation or perpetration of a fraud.

Erhardt vs. Boaro, 8 Fed. 692.

Farley vs. St. Paul M. & M. Ry. Co., 14 Fed. 114, and *Farley vs. Kittson,* 120 U. S. 303, 7 Sup. Ct. R. 534, 30 L. Ed. 684.

That fraud may not be presumed does not imply that it may not be proven by circumstances since it may be apparent from the intrinsic nature and subject of the transaction itself.

Lumpkin vs. Foley, 204 Fed. 372, 122 C. C. A. 542.

Direct evidence is not necessary to prove fraud providing the circumstances relied on are convincing.

In re Hawks, supra.

Specifications of Error Numbers 2, 3 and 5 cover the same subject matter and will be discussed together. They are predicated on the decree of the

lower court (Transc. of Record p. 186) and each pertain to the same point mentioned in the decree in three different ways. In paragraph 2 of the decree the claim of appellant "on account of the certain note of W. Dean Hays, in the sum of $5,000, heretofore charged to the State Bank of Tenino by the United States National Bank of Centralia" is denied with prejudice. In the same paragraph "said note is held and adjudged to be a good, valid and proper charge on the part of the United States National Bank of Centralia against the State Bank of Tenino and its receiver." The denial of appellant's claim and adjudging the note a valid charge against appellant is stating the same thing in different ways. In paragraph 3 of the decree the lower court allows the appellant a general claim against the appellee in the sum of $5,511.13, and no more. If the two actions of the lower court were erroneous, it follows as a matter of course that it was error not to increase appellant's general claim allowed in paragraph 3 of the decree by $5,000.00, the amount of this note.

The "Statement," *supra,* under the caption, "Note of W. Dean Hays for $5,000.00," covers these three specifications.

Appellant contends that there is not a particle of evidence anywhere in the record to support the action of the lower court in charging this note to the State Bank of Tenino. Hays gave his note to the United States National for $5,000.00. In a letter asking for this loan (Transc. of Record p. 177) Hays proposed a disposition of the proceeds, viz: $2,000.00

to retire a previously existing note of his to the United States National and the remaining $3,000.00 to be kept in the United States National as a *special deposit* to the credit of the State Bank of Tenino. What actually happened was, the $2,000.00 took up the old note, but the $3,000.00 was placed to the *general credit* of the State Bank of Tenino in an open account. This account had existed for many years, fluctuated back and forth as different transactions between the two institutions occurred (Transc. of Record p. 120) and after the execution of the note was at times comparatively small and sometimes overdrawn. (Transc. of Record p. 122.) It would seem idle to go further to meet any possible contention of counsel on the other side that a *special deposit* was created. We frankly concede that if the $3,000 had been made a special deposit to the credit of the State Bank of Tenino by the United States National Bank as suggested in Hays' letter asking the loan, evidenced by a certificate of deposit, or any other appropriate instrument, then to that extent but no more, the United States National could successfully make its claim so evidenced against the appellant. But when the $3,000 was placed to the general credit of the Tenino Bank, it could be drawn by it for any purpose on demand. It was so drawn by the Tenino bank for Hays' own private purposes. (Transc. of Record, p. 80.) There was nothing out of the ordinary in such a transaction. (Transc. of Record, p. 144.) When this is coupled with the fact that the United States National permitted the Tenino bank

to reduce this general account less than $3,000, and even overdraw the same, as shown by Gilchrist's testimony, there is no basis whatsoever to make any claim that this $3,000, or any part thereof, constituted a special deposit. Indeed the lower court could not have been controlled by this in its determination of this item because if it had been it would have fixed the amount thereof in the sum of $3,000, while as a matter of fact the amount of the whole note, to-wit: $5,000.00 was charged to appellant by the court. Mr. Gilchrist indulges in some conclusions to the effect that he thought that this note was the note of the State Bank of Tenino and that he supposed it the obligation of the State Bank of Tenino as well as an obligation of W. Dean Hays. But in the very same breath he admits that the State Bank of Tenino was not an endorser and that there was no signature of the State Bank of Tenino on the note. The idea that a banker of twenty-five years' experience, in the absence of some other express agreement, would conclude that this was the note of the State Bank of Tenino or suppose the note was the Tenino bank's obligation, without its endorsement or signature thereon, is so preposterous that we feel sure that it was not the ground of the lower court's ruling, and if it was will not be so considered by this court. About the only office that such conclusions could perform would be to demonstrate that the witness, when testifying, was as careless in his conclusions as he was in handling his depositor's funds. He is paying the penalty the law imposes for the lat-

ter. The former should not be made the basis for an unjust recovery. We are frank to say to the court, that we do not believe the lower court gave these conclusions any consideration whatever. We believe the lower court went wrong on the supposition that there was an agreement made between the two banks fixing a liability on the Tenino bank on account of this note by reason of the acts of the parties in July, 1914. (Transc. of Record, p. 122.)

Having, as we believe, conclusively demonstrated that the Hays' note was owned by the Centralia bank, without any liability thereon on the part of the Tenino bank, prior to July 15, 1914, when the Centralia bank, through the machinations of Gilchrist, first attempted to foist this worthless paper off onto the State Bank of Tenino, we will now discuss the testimony with reference to that attempt. If that attempt was legally consummated the lower court's ruling was right. Otherwise, appellant is entitled to judgment in the sum of $5,000 in addition to the amount allowed. We have just referred to this Hays paper of $5,000.00 as "worthless." This statement is wholly justified beyond cavil. We believe a casual reading of the record will convince the court that Gilchrist found it out not later than about July 15, 1914. Is it not a fair deduction to say that Gilchrist's view was about this: My bank has $5,000 of worthless paper from Hays, it has an active, open account with the Tenino bank that is a present liability, if I can reduce that liability to the extent of $5,000 with this worthless paper my bank is gainer

to that extent, I can surely induce the Tenino bank to accept this because the maker of this worthless paper is the manager of the Tenino bank and as such manager, he will not turn down his own paper? We commend his logic, but not his morals. When his plan was put in operation it failed. Hays says so. (Transc. of Record, p. 77.) Gilchrist admits it. (Transc. of Record, p. 122.) Of course, no one knew better than Hays the worthless character of his own paper and he saw no reason for taking the risks of the penitentiary, with no resultant benefit to him. By that time he and Gilchrist were so intimately involved each with the other in the scheme of organizing and opening the odious Olympia Bank & Trust Company, that he had nothing to fear from Gilchrist. The buying for a bank by one of its officers of the private worthless paper of that officer is often attended with uncomfortable consequence to the purchaser. But Gilchrist was persistent and when Hays went to Olympia and Blumauer became the active manager of the Tenino bank, he again charged Tenino's account with the item and sent the note to the Tenino bank. Again, looking at this matter from Gilchrist's viewpoint, is it not fair to assume that he thought about as follows: Hays would not take this $5,000 of worthless paper off my hands while he was managing the affairs of the Tenino bank, but Hays having been succeeded by Blumauer, who is under heavy financial obligations to my bank will certainly do so? But Blumauer refused. Right here is the whole crux of this $5,000 transaction. The

record will be searched in vain for any testimony showing an acceptance of the sale of this note by anyone authorized to act for the Tenino bank. Nowhere does Gilchrist make any such claim. But there is testimony directly to the contrary by Blumauer. He consulted with Hays and Hays told him it should not have been sent to the Tenino bank, and that Hays would attend to the matter. The Centralia Bank was not given credit for it because Blumauer understood that it was a private transaction between Mr. Hays and Mr. Gilchrist or between Mr. Hays and the United States National Bank. (Transc. of Record, p. 87.) It is very significant that the Tenino bank's books showed no such entry. (Transc. of Record, p. 108.)

Appellee should not have been given credit for this note, first, because there is no evidence whatsoever showing an acceptance by the State Bank of Tenino of the offer of sale, and secondly, because in so doing the court would be consummating a fraudulent scheme, concocted by Gilchrist, to swindle the State Bank of Tenino out of $5,000.00.

In conclusion, we confidently urge this court to reverse the lower court and direct the entry of a decree allowing appellant a general claim against the appellee for $2,500.00 and $5,000 in addition to the amount already allowed in the sum of $5,511.13.

Respectfully submitted,

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Solicitor for Appellant